IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALLEN RAY CLAYTON, Appellant.	No. 37345-9-II UNPUBLISHED OPINION

Houghton, P.J. — Allen Clayton appeals his convictions for unlawful imprisonment and felony harassment, each with a deadly weapon and domestic violence enhancement. He argues that the trial court improperly admitted irrelevant evidence, his trial counsel rendered ineffective assistance, and the trial court erroneously calculated his offender score. Pro se, he argues that his knife was not a deadly weapon and the admission of irrelevant evidence prejudiced his trial outcome.[1] We affirm.[2]

FACTS

In fall 2007, Jessica White and Clayton began a romantic relationship. Unbeknownst to Clayton, she maintained a preexisting relationship with Sean Mcelyea. At the time, White lived

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[1] Clayton argues pro se in a statement of additional grounds under RAP 10.10.

[2] In its brief, the State sought an order affirming Clayton's convictions and dismissing the appeal though a motion on the merits under RAP 18.14(e)(1). Instead, a panel of judges heard the matter.

with Mcelyea in Vancouver. She visited Clayton at his parent's home in Kelso on three or four occasions.

On the evening of December 1, Clayton called White and asked her to come see him in Kelso and she refused. When he threatened to walk to Portland, she agreed to drive to Kelso and borrowed Mcelyea's truck to get there.

Meanwhile, Clayton had begun walking south along Interstate 5. When a police officer stopped him for illegally walking on the Interstate, Clayton explained he was waiting for someone. Moments later, White drove past in a truck and the officer pulled her over and allowed Clayton to get into her truck. The officer then left the scene.

When Clayton got into the truck, he began to swear at White and directed her to drive to his parents' home in Kelso. During the drive, he threw her tax returns out the window and poured a can of soda in the truck and on her.[3]

When they arrived at his parents' home, Clayton took her truck keys and threatened to kill White if she did not quietly walk upstairs. When she reached the upstairs, he pulled her by the hair into a bedroom and put a knife to her arm before he closed and locked the door behind them. He pushed her against the wall and told her to lie down before he tied her up using various cords and cables lying around the room.

After tying her up, Clayton threatened to kill himself. He then injected his arm with a syringe, removed it, and used it to spray residual blood on the wall and by White's head. He then threw two syringe needles near her head before he lost consciousness, slid out of his chair, and fell

[3] Clayton disputes pouring the soda but admits throwing tax returns out the window.

onto the floor.[4] He later awoke and eventually cut the bindings from her body.[5]

White then told Clayton she needed to go downstairs to take her antibiotics, and he allowed her to get them but threatened to kill her if she failed return. She went downstairs, grabbed her purse, and ran outside. She jumped a fence and approached two men working in the area. The men called the police, who picked her up and returned to the house with a warrant while she waited in the patrol car in the driveway.

The officers approached the house and knocked on the door, but no one answered. Moments later Mary Couch, Clayton's mother, pulled into the driveway and invited the officers inside.[6] Couch called Clayton downstairs and, after some questioning, one of the officers arrested him. The officers observed Clayton and determined he was likely under the influence of methamphetamine. In the room where Clayton tied White up, an officer discovered cords, a syringe, and blood splatter on the wall. On Clayton's person, they discovered White's keys and a knife.

The State charged Clayton with first degree kidnapping, second degree assault, and harassment with a deadly weapon. The kidnapping and assault charges carried deadly weapon and domestic violence enhancements, and the harassment charge carried a domestic violence

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[4] He used the syringe a second time and told White to wash the spoon he had used to fill the syringe. She did and returned to the room.

[5] Clayton disputed White's version of the events in the bedroom. He testified at trial that he field tested negative for drugs and that the police did not test the syringe for drugs or the wall for blood. He further testified that he and White practiced consensual bondage as part of their sexual relationship.

[6] One of the officers testified that he obtained a search warrant for the Couch home, but it is unclear from the transcript exactly when that happened.

enhancement.

The jury found Clayton guilty of the lesser included offense of unlawful imprisonment and felony harassment, each with a deadly weapon and domestic violence enhancement. He appeals.

ANALYSIS

Evidence of Drug Use

Clayton first contends the trial court abused its discretion when it admitted evidence of his drug use during the commission of the crime. He argues that under ER 403, the evidence of his drug use during the commission of the offense caused him to suffer unfair prejudice.

We review the admission of evidence for abuse of discretion and afford great deference to the trial court's ruling. *State v. French*, 157 Wn.2d 593, 605, 141 P.3d 54 (2006). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

Here, the trial court did not abuse its discretion by admitting the evidence of conduct consistent with drug use because it clearly stated a reasonable and tenable basis for its ruling in the record.[7] Responding to defense counsel's concern that officers would testify to Clayton's drug use, the trial court said "[the officers] will not be allowed to express an opinion that [Clayton is] guilty. . . . [b]ut I don't see why they cannot describe his conduct . . . . we will follow the rules of evidence." I Report of Proceedings (RP) 33-34. Clayton fails to establish that the trial court abused its discretion by admitting the officers' description of Clayton's conduct.

[7] We note that Clayton's claim the trial court erred by allowing the officer's testimony that he acted like someone using methamphetamine also fails. The trial court merely allowed the officers to testify based on their perceptions and experiences. ER 602; ER 701.

Ineffective Assistance of Counsel

Clayton next contends that his counsel rendered ineffective assistance by failing to object to various questions the State posed at trial. He argues that his counsel should have objected when the State elicited evidence that (1) he failed to come to the door when the police officers first knocked; (2) the police officers handcuffed and arrested him; (3) the Couch house was where the crime occurred; (4) White was the victim of the crimes; (5) his mother did not initially want to cooperate with the police; and (6) included stickers with handwritten notes identifying the victim, suspect, and alleged offense in evidence that went to the jury.

A claim of ineffective assistance of counsel requires a showing of deficient performance by counsel and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Clayton must overcome a strong presumption of counsel's effective assistance. *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004).

Clayton first argues that his counsel should have objected to the officers' testimony about an unanswered knock at his parents' home because the testimony constituted a comment on silence. Testimony that a police officer knocked on a door is not a comment on silence because it does not attest to Clayton's invocation of his right to silence. *Cf. State v. Knapp*, 148 Wn. App. 414, 421, 199 P.3d 505 (2009); *State v. Slone*, 133 Wn. App. 120, 128, 134 P.3d 1217 (2006) ("'A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.'") (emphasis omitted) (quoting *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)).

Clayton's second and third arguments, that the State improperly presented evidence the

police arrested him and referred to the events as a "crime," also do not form the basis for an ineffective assistance of counsel claim. *See*, *e.g.*, *State v. Lillard*, 122 Wn. App. 422, 431-32, 93 P.3d 969 (2004) (res gestae prevents a defendant from using ER 404(b) to force the State to present a fragmented version of the facts). Further, he fails to show any resulting prejudice. *See Strickland*, 466 U.S. at 687.

His fourth argument is that the use of the term "victim" by a testifying officer prejudiced the trial outcome. Division One has held the error harmless even when the trial court uses this reference. *State v. Alger*, 31 Wn. App. 244, 249, 640 P.2d 44 (1982) (although inadvisable, a comment by the court referring to the "victim" does not prejudice the defendant's right to a fair trial). Thus, any error here is harmless.

His fifth argument is that the State improperly elicited information about his mother's reluctance to agree to a search. Clayton cites no authority for his argument that this testimony amounted to an opinion of guilt. Absent such authority, we decline to review the argument. RAP 10.3(a)(6).

His final argument is that evidence tags prejudiced the trial outcome because they allowed inadmissible evidence identifying the victim, the nature of the crime charged, and the identity of the suspect. In *State v. Velasquez*, 67 Wn.2d 138, 143, 406 P.2d 772 (1965), our Supreme Court stated that while the better practice is to remove the police identification tags, the failure to do so is harmless error because the tags have "no probative effect" in view of a cautionary instruction together with abundant evidence of guilt.

This case is similar to *Velasquez* in that the jury received instructions on how to consider

the evidence presented at trial and, like Velasquez, Clayton faces abundant evidence of guilt. Therefore, like Velasquez, any error Clayton suffered was harmless and did not prejudice his trial outcome. *Velasquez*, 67 Wn.2d at 143. In sum, his claims of ineffective assistance of counsel fail.

Offender Score Calculation

Clayton next contends the trial court erroneously calculated his offender score. He asserts that the State failed to prove the comparability of his prior Oregon convictions. In response, the State argues that he waived this issue.

Offender score challenges may be raised for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). We review a calculation of an offender score de novo. *State v. Wilson*, 113 Wn. App. 122, 136, 52 P.3d 545 (2002).

The Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, ordinarily requires the sentencing court to conduct a comparability analysis to determine whether the out-of-state elements comport with the Washington elements for a similar crime. *Ross*, 152 at 229-30. A defendant's affirmative acknowledgement that prior out-of-state convictions are properly included in the offender score calculation also satisfies the SRA requirements. *Ross*, 152 at 229-30.

At sentencing, defense counsel said, "Your Honor, what I've seen that [the prosecutor] has provided, it looks like the two sentences are -- were run consecutive down there, and I think that creates a legitimate question about whether they are in fact same criminal conduct or they could be treated as two." 3 RP at 464. The State replied,

> Your Honor, the convictions that we're talking about are Theft in the First Degree in Oregon, which would be Theft of a Firearm here essentially. That crime, and then Unlawful Use of a Weapon for firing that firearm at another person. Your Honor, Oregon, I don't believe, has the same type of same criminal conduct analysis, so it's not reflected on the Oregon judgment.

> But I think under our case law it's very clear that it is not the same intent when you steal a firearm and then fire that firearm at another individual or another car. So, Your Honor, I don't believe it comprises the same criminal conduct.

3 RP at 465. This brief argument addresses the elements of the crimes and how Clayton's actions in Oregon would have been prosecuted had they occurred in Washington, thus satisfying the SRA's required comparability analysis. *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998).

After hearing argument, the trial court concluded, "I don't know that I have any basis to find that the Oregon convictions are the same criminal conduct. . . . Quite frankly, I'm surprised that the standard range is nine to 12 months because I thought the conduct was severe." 3 RP at 471. The trial court assigned an offender score of 3: 1 point each to the two Oregon convictions, and 1 point to his other current offense not constituting the same criminal conduct.

Clayton's argument at sentencing does not show an affirmative waiver of the issue. Nonetheless, the trial court properly found that the two Oregon convictions were not the same criminal conduct and, thus, did not err in calculating Clayton's offender score.

Statement of Additional Grounds

Pro se, Clayton contends that his knife was not a deadly weapon and the admission of irrelevant evidence prejudiced his trial outcome. Because we have already addressed the admission of this evidence and potential for prejudice, we turn to an analysis regarding the knife.

Clayton argues that because the jury convicted him of a lesser included offense in one instance and found him not guilty of second degree assault in another, it must not have believed the State's case and therefore not believed that he was armed with a deadly weapon at all. We

disagree.

Clayton misapprehends the disparate nature of the charges and convictions. The jury properly followed its instructions and the law when it concluded that although he was not guilty of some crimes that carried a deadly weapon enhancement, he was guilty of others that carried a separate deadly weapon enhancement. His argument fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

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Bridgewater, J.

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Kulik, J.